

I. INTRODUCTION

1. Ingrid Hess has requested a review of the dismissal by the College of Physicians and Surgeons of Alberta (the "CPSA") Complaints Director (the "Complaints Director") of the complaint against the Respondent, Dr. Lloyd T. Clarke, pursuant to Section 68(1) of the *Health Professions Act*, RSA 2000, c H-7 (the "HPA").
2. Dr. Clarke submits that the Complaint Director's decision to dismiss the complaint was reasonable, and should be confirmed by the Complaint Review Committee (the "Committee").

II. BACKGROUND OF COMPLAINT

3. Dr. Clarke practises family medicine in the town of Cardston, Alberta. He is a partner at the Cardston Clinic, and also has privileges as a general physician at Cardston Municipal Hospital. Dr. Clarke has practised family medicine in Cardston since 1996. Individuals who are Indigenous make up over half of his panel of patients.
4. Dr. Clarke held the position of Associate Zone Medical Director South Zone with Alberta Health Services ("AHS") from October 2016. He was on administrative leave from this position pending an investigation by AHS into the allegations that are the focus of this review. Recently, Dr. Clarke chose to resign from his position as Associate Zone Medical Director, in part because he feels that he cannot be effective in this role while these complaints are outstanding.
5. On June 11, 2018, the CPSA received two complaints from Ms. Hess concerning Dr. Clarke (the "Original Complaints"). On August 3, 2018, the CPSA received a subsequent complaint (dated July 30, 2018) from Ms. Hess concerning Dr. Clarke (the "Subsequent Complaint"). (Together, the Original Complaints and the Subsequent Complaint are the "Complaints".)
6. The Complaints all concerned a personal interaction between Dr. Clarke and a group of individuals in Cardston. The Original Complaints were brought specifically on behalf of two of these individuals. As Ms. Hess has stated in her submissions, the individual on whose behalf she has brought the Subsequent Complaint, Mr. Terrence Scott Many Grey Horses, was an intervener in this interaction.

7. In a June 22, 2018 letter, the Complaints Director wrote to Ms. Hess, dismissing the Original Complaints.
8. In an August 21, 2018 letter, the Complaints Director again wrote to Ms. Hess, dismissing the Subsequent Complaint (the "Complaints Dismissal"). [Tab 1, pages 1-2]
9. In the Complaints Dismissal, the Complaints Director summarized the Subsequent Complaint as follows: "On May 25, 2018 Mr. Many Grey Horses came across a scene outside of the Reddimart on Main Street (Cardston). Mr. Many Grey Horses writes that Dr. Clarke was verbally abusing a group of Indigenous people. Mr. Many Grey Horses stepped in to try and stop him. Mr. Many Grey Horses writes that Dr. Clarke in turn called the police falsely accusing him of being 'aggressive.' Police became involved." [Tab 1, page 1]

III. THE CPSA ANALYSIS AND DECISION

10. In the Complaints Dismissal, the Complaints Director referred back to the analysis he provided in dismissing the Original Complaints. The Complaints Director informed Ms. Hess that the CPSA's Professional Conduct Department is designed to consider and address complaints which relate to the provision of medical care. [Tab 1, page 1]
11. The Complaints Director found that, while Dr. Clark's remarks were unfortunate and inappropriate, the concerns raised in the Complaints did not relate to patient care. He stated that the CPSA cannot dictate a physician's behaviour outside a clinical setting, excluding extreme circumstances. [Tab 1, page 1]
12. On this basis, the Complaints Director determined that there was insufficient evidence of unprofessional conduct to move forward with further investigation into Dr. Clarke's conduct. [Tab 1, page 2]

IV. ISSUES

13. The issue before the Committee is whether the decision of the Complaints Director, dismissing the complaint, was reasonable.

V. ARGUMENT

The Decision Was Reasonable

14. The Complaints Director's dismissal decision is reviewable on a standard of reasonableness.
15. "Reasonableness" is described in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47 as a deferential standard animated by the principle that certain questions may give rise to a number of possible, reasonable conclusions. A review for reasonableness includes an inquiry "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." [Tab 2]
16. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process, but is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, para 47). [Tab 2]
17. Further, "a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion." If the reasons allow the reviewing body to understand why the decision was made, and whether it fell within a range of acceptable outcomes, the above criteria are met (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16, citing *S.E.I.U., Local 333 v Nipawin District Staff Nurses Assn* (1973), [1975] 1 SCR 382 (SCC), at p 391). [Tab 3]
18. As stated by the Supreme Court of Canada in *Dunsmuir* and reiterated in *Newfoundland Nurses*, in deciding whether or not a decision was reasonable in light of the outcome and the reasons, decision-makers must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir* at para 48; *Newfoundland Nurses* at para 15). [Tab 2; Tab 3]
19. Therefore, the reasonableness review shows deference to the decision and will consider:
 - (a) whether the process of articulating the reasons exhibits justification, transparency, and intelligibility; and

- (b) whether the outcome was within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

A. The process of articulating the decision was reasonable

20. The Complaints Dismissal contained ample information to justify the Complaints Director's decision, it provided transparency into that decision, and it was intelligible.
21. The Complaints Director outlined his role in the process, and indicated that, when considering whether there was evidence that Dr. Clarke engaged in unprofessional conduct, he would be considering whether Dr. Clarke contravened the College's *Code of Conduct* or *Standards of Practice*.
22. The Complaints Director went on to outline the reasons for which he concluded that there was insufficient evidence of unprofessional conduct to move forward with further investigation into Dr. Clarke's conduct. In so doing, the Complaints Director demonstrated understanding of the feelings of those affected by Dr. Clarke's remarks; but also made it very clear why he made the decision to dismiss the Subsequent Complaint.

B. The outcome of the decision was reasonable

23. Pursuant to section 55(2) of the *HPA*, upon receiving a complaint, the Complaints Director may take one of several prescribed actions, including dismissing the complaint where the Complaints Director is satisfied that there is insufficient or no evidence of unprofessional conduct (section 55(2)(f)).
24. The Complaints Director's decision to dismiss the Subsequent Complaint due to a finding that there was insufficient evidence of unprofessional conduct was thus clearly an available outcome.
25. The Complaints Director's decision was also reasonable based on the facts before him, and therefore fell within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

C. Conclusion Regarding the Reasonableness of the Decision

26. As the Complaints Director's decision was reasonable in both its articulation and its outcome, the decision met the legal standard of reasonableness.

27. As a result, Dr. Clarke respectfully submits that the Committee should find that the Complaints Director reached a reasonable decision in dismissing the Subsequent Complaint on the basis that there was insufficient evidence of unprofessional conduct to move forward with further investigation into Dr. Clarke's conduct.

VI. RESPONSE TO REQUEST FOR REVIEW

28. Ms. Hess's request for review of the Complaints Dismissal, along with her written submissions to the Committee, focus on the longstanding mistreatment of, and discrimination against, Indigenous people in Canada, and the effects of this mistreatment and discrimination on the ability of Indigenous people to obtain proper medical care. This is a serious issue, which deserves the care and attention of the medical profession. Dr. Clarke shares Ms. Hess's concern.
29. Dr. Clarke does not dispute that he was involved in the regrettable incident referred to in the Subsequent Complaint. He further agrees that his remarks were unfortunate and inappropriate. However, Dr. Clarke does not fully agree with the facts as recounted in the Subsequent Complaint, and disagrees with Ms. Hess's characterization of his remarks in the incident.
30. In a July 17, 2018 letter to AHS (the "Letter to AHS"), Dr. Clarke recounted his own recollection of the incident. He did tell the group of individuals assembled outside the Red Rooster in Cardston that they should get jobs, and stop loitering. He also made a reference to Tylenol #3, an admittedly ill-advised comment which, as explained in the Letter to AHS, alluded to a previous humorous interaction with another group of Indigenous individuals, who suggested to Dr. Clarke, in jest, that a car that was not running properly could be fixed with Tylenol #3. Dr. Clarke's comment was intended to defuse tension; needless to say, it was unsuccessful. Dr. Clarke then attempted to introduce himself to the group of individuals, but the comments he received in response indicated that individuals in the group were at that point more interested in retribution than repairing relationships. Contrary to the allegation in the Subsequent Complaint, Dr. Clarke did *not* call the police, but his subsequent understanding is that the Red Rooster store clerk did. [Tab 4, pages 2-3]
31. Dr. Clarke's comments were insensitive, but they were not racist. They were also not characteristic of Dr. Clarke's typical approach to Indigenous people. At the time of the

incident, Dr. Clarke was going through a particularly stressful period, largely related to his role as one of the physicians involved in the well-known case of *R. v. Stephan*, 2018 SCC 21 [*Stephan*], which had just come before the Supreme Court of Canada, and which had made him the target of animosity in his small community and on social media. This does not excuse Dr. Clarke's conduct, but, as his wife later told him, he was not himself in the days leading up to the incident. [Tab 4, pages 1-2]

32. Dr. Clarke's comments were also motivated by conversations he has had with both Indigenous and non-Indigenous members of the community in and around Cardston, in which those community members have expressed concern over the impact of people frequently loitering in the downtown Cardston area. He now understands that it was not his place to speak to this matter. [Tab 4, page 1]
33. An indigenous person himself (a Maori from New Zealand), Dr. Clarke has had strong positive relationships with members of the Indigenous communities around Cardston. The documents of support prepared in July 2018 by members of the local Indigenous community attest to this. In his role with the AHS, Dr. Clarke has participated in Indigenous events, liaised with the Blood Tribe (Kainai Nation) and the Piikani Nation, and been called on when issues relating to Indigenous people arose. He has also been frustrated by the apparent inability to improve the situation of underserved and vulnerable community members around Cardston. All of this only contributes to his deep regret regarding his remarks in the incident. [Tab 5; Tab 6; Tab 4, page 1]
34. Dr. Clarke's remarks have resulted in him engaging in a great deal of introspection. Having recognized that the *Stephan* case was affecting him more than he realized, and wanting to deal with the stress caused by both the *Stephan* case and the incident, Dr. Clarke engaged with a therapist; he has found this helpful. [Tab 4, page 2]
35. Since the incident, Dr. Clarke has also participated in an Indigenous Sundance with members of the Blood Tribe (Kainai Nation) (and has prepared a narrative of his participation in this event). He was deeply moved by the experience. Dr. Clarke is grateful to have been allowed to take part in, and gain a greater understanding of, the Sundance. He is committed to forming a better, even stronger connection with his Indigenous neighbours, friends, and patients; he is further committed to increasing his understanding of the barriers faced by Indigenous people. [Tab 4, page 2; Tab 7]

36. Finally, Dr. Clarke has arrived at a consensual resolution with AHS, in relation to AHS's own investigation into the incident (during which AHS engaged an Indigenous consultant, Dr. Leroy Little Bear). As part of this consensual resolution, Dr. Clarke is consulting with a member of the local Indigenous community over the best and most constructive way for him to address an apology to the individuals hurt and angered by his remarks. He has already taken steps to increase his awareness of issues facing the Indigenous community, and will continue to do so.
37. Ms. Hess submits that Dr. Clarke's remarks indicate an inability on his part to provide proper medical care for his Indigenous patients. These remarks—out of character, and deeply regretted—were not made in clinical practice. However, as part of his clinical practice, Dr. Clarke has a large number of Indigenous patients—constituting more than half of his panel of patients—whom he treats with care and respect (as commented on in the attached letters of support). No complaints have come out of Dr. Clarke's clinical practice. Ms. Hess's submissions are speculative and unfounded, and the Complaint Director's decision that the Subsequent Complaint did not relate to patient care, and that there was insufficient evidence of unprofessional conduct to move forward with further investigation into Dr. Clarke's conduct, was warranted. [Tab 5, Tab 6]
38. Ms. Hess has had the advantage of seeing Dr. Clarke's written submission relating to the Original Complaints (the "Original Submission"). In both form and substance, the Original Submission was virtually identical to the present submission. Nevertheless, instead of taking the opportunity to engage with the substance of the Original Submission, Ms. Hess in her written submissions has chosen to focus on small details that are of no relevance to the substance of the Complaints.¹ Ms. Hess also notes that Dr. Clarke has acknowledged some "key facts"—namely, that Dr. Clarke first addressed the gathered individuals, that he made an admittedly ill-advised comment regarding Tylenol #3, and that "the street people did very little in response"—but in truth Dr. Clarke has never disputed any of the foregoing.

¹ Rather than engaging with the substance of Dr. Clarke's Original Submission, Ms. Hess highlights two of the three individual accounts that were appended to Dr. Clarke's Letter to AHS. She states, for example, that the store clerk, Kari Perry, makes a "false claim", when Ms. Perry was inside the Red Rooster store at the time of the incident, and was clearly giving her own understanding of the incident and why she had called the police. She also notes that Becky Leavitt's estimate of the number of people involved is lower than that of Dr. Clarke, although Mr. Many Grey Horses himself stated, regarding the original group of individuals involved in the incident, that "there was a group of natives/registered Bloods....all hanging around the pay phone at the front of the store....about a good 10 of the hommies." There seems to be a variety of recollections as to the number of individuals initially involved in the incident, which is particularly understandable in light of both the fact that the size of the group involved appears to have swelled in size over the course of the incident, and the inherent unreliability of eyewitness testimony in general. [Tab 8; Tab 4, pages 5, 6]

What Dr. Clarke does dispute is Ms. Hess's allegation that his unfortunate and inappropriate remarks were racist. Ms. Hess's written submissions do not seem to grasp this distinction.

[Ingrid Hess's Written Submissions, page 2]

39. In her written submissions, Ms. Hess states, "Why would a number of people gathered be 'intimidating' if their race and social condition was not a factor?" She subsequently states that Dr. Clarke "cannot simply deny the 'racist' nature of his act by omitting from the facts of this situation that the people he was targeting are Indigenous." In implying that race *must always* be at issue in these situations, Ms. Hess's written submissions make an unjustified logical leap. Unfortunate comments to a member or members of a racialized group (whether that individual or those individuals be Indigenous or otherwise) are not necessarily attributable to race-based unconscious bias. Fear of "a number of people gathered" may stem from factors other than racialized identity or social condition. Again, this distinction is what Ms. Hess's submissions ignore or fail to understand—that Dr. Clarke's comments were both unfortunate and inappropriate, and addressed to Indigenous individuals, but not racist, as he has consistently and credibly attested. [Ingrid Hess's Written Submissions, page 3]
40. Mr. Many Grey Horse, in contrast, appears to grasp this distinction, having himself written that "this doctor is probably a nice guy....who just had a bad day." [Tab 9]
41. Ms. Hess's written submissions also seek to hold Dr. Clarke responsible for the police being called. Dr. Clarke admits that his actions initiated the incident, but Ms. Hess's written submissions acknowledge that Mr. Many Grey Horses was an intervener who chose to come into the incident willingly. Moreover, as already recounted, Dr. Clarke tried to defuse the situation, and did not himself call the police.
42. In summary, the substance of the Subsequent Complaint has nothing to do with medical care. Dr. Clarke's remarks were unfortunate and inappropriate, but not racist. He deeply regrets them. They represent an uncharacteristic and isolated event during a stressful period in his private life. The subject matter of the Subsequent Complaint has already been addressed by AHS, which is the appropriate forum for dealing with complaints of this nature. Dr. Clarke looks forward to having the opportunity to apologize, in an appropriate forum, to the individuals involved in the incident, and to the Blood Tribe (Kainai Nation) and Piikani Nation generally. He hopes to bring an increased awareness of the barriers

faced by Indigenous people in Canada to his future interactions with members of the Indigenous community, in both his daily practice of medicine and his daily life.

VII. HEALTH PROFESSIONS ACT

43. Pursuant to section 68(5) of the *HPA*, the Committee must do one of three things:

- (a) refer the matter to the hearings director for a hearing; OR
- (b) direct the complaints director to conduct or appoint an investigator to conduct a further investigation and to prepare a report on the further investigation and submit it to the Committee for its consideration; OR
- (c) confirm that the complaint is dismissed if in the opinion of the Committee (i) the complaint is trivial or vexatious, or (ii) there is insufficient or no evidence of unprofessional conduct.

44. The Committee must provide reasons for its decision.

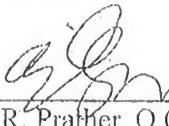
VIII. RELIEF SOUGHT

45. It is respectfully submitted that the Committee ought to confirm that the Subsequent Complaint is dismissed, as the Complaints Director's decision was reasonable in that there is insufficient evidence of unprofessional conduct.

All of which is respectfully submitted this 4th day of December, 2018.

BENNETT JONES LLP

Per:


Valerie R. Prather, Q.C./Allison J. Lepp
Solicitors for Dr. Lloyd T. Clarke